

**RIGHT TO KNOW ADVISORY COMMITTEE
ENCRIPTION SUBCOMMITTEE**

AGENDA

August 15, 2012

9:00 a.m.

Room 438, State House, Augusta

Convene

1. Welcome and introductions (Linda Pistner, Chair)
2. Information requested from staff at last meeting:
 - Federal laws/rules pertaining to encryption of emergency transmissions
 - Applicable state law
3. Department of Public Safety – provide a list of subject matter and situations that are or should be confidential when transmitted over the emergency/public safety systems (Lt. Don Pomelow and Major Grotton)
4. General discussion and development of report to full committee
5. Scheduling next meeting and agenda items (if needed)

Adjourn

Response to Encryption Subcommittee request for information about federal or state law that may apply to the encryption of public safety radio transmissions.

Prepared by Curtis Bentley, OPLA

August 15, 2012

As you recall, the Encryption Subcommittee asked staff to work with the AG to identify any federal or state laws/regulations/policies regarding the encryption (scrambling) of public safety radio transmissions. I have been working with Laura Yustak Smith on this request.

Federal law:

I did not locate any federal laws or rules that are clearly applicable to the encryption of police or first responder radio transmissions.

Laura contacted United States Attorney Mark Winter about the existence of any applicable federal laws or rules and he is unaware of any applicable federal law or regulation. Mr. Winter directed us to Michael Wilhelm, Deputy Chief of the Policy Division in the FCC's Public Safety and Homeland Security Bureau for information about any Federal Communication Commission rules or policies regarding encryption. Mr. Wilhelm stated that "[T]he Commission's rules do not require encryption of public safety communications. That said, encryption is commonly used, notably on tactical police channels."

I contacted Rob Turner, Chief Inspector, Tactical Operations Division, Office of Strategic Technology, U.S. Marshals Service regarding the protocol the U.S. Marshals Service uses to determine what radio transmissions to encrypt/scramble. He e-mailed me the following USMS **policy** statement. "All USMS radio communications must be encrypted with the current edition of USMS key. Unencrypted transmissions are allowed only in cases of exigent circumstances and to ensure interoperability in a critical incident" In response to my follow-up question about how the policy was developed he responded, "I wrote the policy with input from Chief deputies and operational users in the field. Our implementation of encryption wide scale is an officer safety enhancement. We cannot afford to have our enforcement operations, high threat prisoner movements and personal protection operations intercepted by the general public and distributed by the media."

State law:

Criminal History Record Information Act (Title 16, subchapter 8). This Act places restrictions on state criminal justice agencies, courts and the Office of the Attorney General regarding the dissemination of certain criminal justice "records." While radio transmission by criminal justice agencies may contain information that would be subject to the Act, it is unlikely en route radio transmissions would be considered "records" for

purposes of the Act. Once the radio transmission is recorded the provisions of the Act may apply.

Freedom of Access (Title 1, chapter 13). It is unlikely that the public access requirements of FOA would apply to police or first responder radio transmissions en route because such communications do not appear to fall under the definition of “public record” (1 MRSA § 402, sub-§ 3) or a “public proceeding” (1 MRSA § 402, sub-§ 2). Once the radio transmission is recorded the provisions of the Act may apply as well as the confidentiality provisions of Title 25, chapter 352 or other Maine statute.

Emergency Services Communications (Title 25, chapter 352) §2929. Confidentiality of system information (E-9-1-1). This statute makes certain E-9-1-1 call information confidential and defines “confidential information” as information “contained in any database, report, audio recording or other record of the bureau or a public safety answering point....” It is not clear that en route radio transmissions would be considered a database, report or recording for purposes of this statute.

Based on my review of the statutes and legislative history, it appears that the Legislature did not fully contemplate the interception of police and first responder radio transmissions by third parties when enacting these provisions of law.

**Maine Revised Statute Title 15, Chapter 102:
INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS**

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15 §709. DEFINITIONS

The following words and phrases as used in this chapter, unless the context otherwise indicates, shall have the following meanings. [1973, c. 561, (NEW) .]

1. Communication common carrier. "Communication common carrier" means any telephone or telegraph company.

[1973, c. 561, (NEW) .]

1-A. Administration of criminal justice. "Administration of criminal justice" has the same meaning as in Title 16, section 611, subsection 1.

[1987, c. 680, §1 (NEW) .]

2. Contents. "Contents," when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport or meaning of that communication.

[1973, c. 561, (NEW) .]

3. Intercepting device. "Intercepting device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

A. Any telephone or telegraph instrument, equipment or facility or any component thereof being used by a communication common carrier in the ordinary course of its business or extension telephones used by a subscriber to telephone service; or [1973, c. 561, (NEW) .]

B. A hearing aid or similar device being used to correct subnormal hearing to not better than normal. [1973, c. 561, (NEW) .]

[1973, c. 561, (NEW) .]

4. Intercept. "Intercept" means to hear, record or aid another to hear or record the contents of any wire or oral communication through the use of any intercepting device by any person other than:

A. The sender or receiver of that communication; [1979, c. 701, §11 (AMD) .]

B. A person within the range of normal unaided hearing or subnormal hearing corrected to not better than normal; or [1973, c. 561, (NEW) .]

C. A person given prior authority by the sender or receiver. [1979, c. 701, §11 (AMD) .]

[1979, c. 701, §11 (AMD) .]

4-A. Investigative officer. "Investigative officer" means an employee of the Department of Corrections designated by the Commissioner of Corrections as having the authority to conduct investigations of offenses relating to the security or orderly management of a facility administered by the department.

[1997, c. 361, §1 (AMD) .]

4-B. County jail investigative officer. "County jail investigative officer" means an employee of a county jail designated by the county jail administrator as having the authority to conduct investigations of offenses relating to the security or orderly management of the county jail.

[1997, c. 361, §2 (NEW) .]

5. Oral communications. "Oral communications" means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

[1973, c. 561, (NEW) .]

6. Person. "Person" means any individual, partnership, association, joint stock company, trust or corporation, or any other legal entity, whether or not any of the foregoing is an officer, agent or employee of the United States, a state or a political subdivision of a state.

[1973, c. 561, (NEW) .]

7. Wire communication. "Wire communication" means any communication made in whole or in part through the use of facilities for transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception.

[1973, c. 561, (NEW) .]

SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 701, §11 (AMD). 1987, c. 680, §1 (AMD).
1997, c. 361, §§1,2 (AMD).

15 §710. OFFENSES

1. Interception, oral communications prohibited. Any person, other than an employee of a common carrier as defined in this chapter, a law enforcement officer or an investigative officer as defined in this chapter, carrying out practices otherwise permitted by this chapter, who intentionally or knowingly intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire or oral communication is guilty of a Class C crime.

[1987, c. 680, §2 (AMD) .]

2. Editing of tape recordings in judicial proceedings prohibited. Any person who knowingly or intentionally edits, alters or tampers with any tape, transcription or other sound recording, or knows of such editing, altering or tampering, and presents that recording in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made and the original state of the recording, is guilty of a Class C crime.

[1979, c. 663, §96 (AMD) .]

3. Disclosure, or use of wire or oral communications prohibited. A person is guilty of a Class C crime if he:

A. Intentionally or knowingly discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or [1979, c. 663, §97 (RPR) .]

B. Intentionally or knowingly uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception. [1979, c. 663, §97 (RPR) .]

4. Duty to report. Any communications common carrier shall promptly report to the Attorney General any facts coming to its attention in the conduct of its business which may indicate a possible violation of this section and such carrier shall adopt reasonable rules to assure compliance with this subsection, provided

such carrier shall not be liable to any person who may claim an injury arising out of any such report, if made in good faith. Any person violating this subsection shall be subject to a civil penalty not to exceed \$5,000, payable to the State, to be recovered in a civil action.

[1979, c. 663, §98 (AMD) .]

5. Possession of interception devices prohibited. A person, other than an employee of a common carrier as defined in this chapter, a law enforcement officer or an investigative officer as defined in this chapter, carrying out practices otherwise permitted by this chapter, who has in his possession any device, contrivance, machine or apparatus designed or commonly used for intercepting wire or oral communications defined in this chapter, is guilty of a Class C crime.

[1987, c. 680, §3 (AMD) .]

6. Sale of interception devices prohibited. A person who sells, exchanges, delivers, barter, gives or furnishes or possesses with an intent to sell any device, contrivance, machine or apparatus designed or commonly used for the interception of wire or oral communications as defined in this chapter is guilty of a Class B crime. This subsection shall not include devices manufactured under written contract for sale to common carriers, law enforcement agencies and the Department of Corrections, provided that the production of any such device shall not have commenced prior to the signing of the contract by both parties.

[1987, c. 680, §4 (AMD) .]

SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 663, §§95-100 (AMD). 1987, c. 680, §§2-4 (AMD).

15 §711. CIVIL REMEDY

Any party to a conversation intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses such communications and shall be entitled to recover from any such persons: [1973, c. 561, (NEW) .]

1. Damages. Actual damages, but not less than liquidated damages, computed at the rate of \$100 per day for each day of violation; and

[1979, c. 663, §101 (AMD) .]

2. Attorney's fee. A reasonable attorney's fee and other litigation disbursements reasonably incurred.

[1973, c. 561, (NEW) .]

SECTION HISTORY

1973, c. 561, (NEW). 1979, c. 663, §101 (AMD).

15 §712. EXCEPTIONS

1. Switchboard operators, communication common carrier agent. It is not a violation of this chapter for an operator of a switchboard or an officer, employee or agent of any communication common carrier, as defined in this chapter, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of the communication, provided that the communication common carriers

shall not utilize service for observing or random monitoring, except for mechanical or service quality control checks, nor shall any such officer, employee or agent use or disclose to another the contents as defined in this chapter of the communication so intercepted.

[1987, c. 680, §5 (NEW) .]

2. Investigative officers. It is not a violation of this chapter for an investigative officer, as defined in this chapter, or for an employee of the Department of Corrections acting at the direction of an investigative officer, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the administration of criminal justice, if:

A. Either the sender or receiver of that communication is a person residing in an adult or juvenile correctional facility administered by the Department of Corrections; and [2009, c. 93, §1 (AMD) .]

B. Notice of the possibility of interception is provided in a way sufficient to make the parties to the communication aware of the possibility of interception, which includes:

- (1) Providing the resident with a written notification statement;
- (2) Posting written notification next to every telephone at the facility that is subject to monitoring; and
- (3) Informing the recipient of a telephone call from the resident by playing a recorded warning before the recipient accepts the call. [1997, c. 361, §3 (AMD) .]

C. [1997, c. 361, §3 (RP) .]

This subsection does not authorize any interference with the attorney-client privilege.

[2009, c. 93, §1 (AMD) .]

3. County jail investigative officer. It is not a violation of this chapter for a county jail investigative officer, as defined in this chapter, or for a county jail employee acting at the direction of a county jail investigative officer to intercept, disclose or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the administration of criminal justice if:

A. Either the sender or the receiver of that communication is a person residing in an adult section of the county jail; and [1997, c. 361, §4 (NEW) .]

B. Notice of the possibility of interception is provided in a way sufficient to make the parties to the communication aware of the possibility of interception, which includes:

- (1) Providing the resident with a written notification statement;
- (2) Posting written notification next to every telephone at the jail that is subject to monitoring; and
- (3) Informing the recipient of a telephone call from the resident by playing a recorded warning before the recipient accepts the call. [1997, c. 361, §4 (NEW) .]

This subsection does not authorize any interference with the attorney-client privilege.

[1997, c. 361, §4 (NEW) .]

SECTION HISTORY

1973, c. 561, (NEW). 1973, c. 788, §61 (AMD). 1979, c. 701, §12 (AMD).
1987, c. 680, §5 (RPR). 1995, c. 182, §1 (AMD). 1997, c. 361, §§3,4
(AMD). 2009, c. 93, §1 (AMD).

15 §713. EVIDENCE

The contents of an interception are not admissible in court, except that the contents of an interception of any oral or wire communication that has been legally obtained under the laws of another jurisdiction in which the interception occurred or that has been legally obtained pursuant to section 712, subsection 2 or 3 is admissible in the courts of this State, subject to the Maine Rules of Evidence. [1997, c. 361, §5 (AMD) .]

SECTION HISTORY

1979, c. 701, §13 (NEW). 1983, c. 379, (AMD). 1995, c. 182, §2 (AMD). 1997, c. 361, §5 (AMD).

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